



# Employment Law Briefing

Insights on Legal Issues in the Workplace

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# Supervisor-subordinate relationships under Title VII

**D**etermining when a sexual relationship between a supervisor and a subordinate is the result of supervisory coercion can be tricky. What constitutes proof that a subordinate was forced to engage in sexual activity to keep her job? Would a reasonable person believe she would be fired or suffer other tangible employment consequences if she declined to have sex with her supervisor?

Here's how the Ninth Circuit answered these questions in *Holly D. v. California Institute of Technology*.

## Unwelcome sexual advances

A female assistant to a college professor alleged that he forced her to engage in sexual relations with him to keep her job. Although she admitted that he never told her that she would be fired, demoted or otherwise penalized if she refused, she claimed her continued employment by implication depended on complying with his unwelcome sexual advances.

During her six-month probationary period, the assistant claimed the professor looked at her buttocks and breasts, made sexual comments, and showed her pornographic Web sites. One month after she received a mediocre performance evaluation (but no threat to terminate her employment), the professor asked her to engage in a sex act and she acquiesced. During the following year, they engaged in various sex acts in their offices, and he rated her work performance as excellent. When their sexual relations appeared to have ended, she tried unsuccessfully to transfer to other jobs. She believed that she wasn't hired for these positions because she had taken medical leave for clinical depression.

Six months later, she filed a charge with the EEOC (later dismissed), alleging disability discrimination. Three months after that, she preserved evidence on her coat of a final sexual encounter with the professor. After another six months, she filed a sexual-harassment claim with the EEOC, and the college investigated her allegations. The professor denied any sexual contact, she refused to allow testing of the stain on her coat, and the investigators found insufficient evidence of sexual harassment. Nevertheless, they recommended transferring her to a female professor and "reminding" the professor of the college's harassment policy. After the investigation concluded, the assistant allowed the college to test the coat, the DNA on it matched the professor's, and he resigned.



## No threats

The assistant sued the college, alleging sexual harassment. She admitted that the professor never expressly threatened her with job-related consequences if she refused his advances and that he never stated any connection between his requests for sex and any problem with her past work performance or her future employment prospects. But she alleged that she believed her job depended on her

sexual submission. She argued that when she rebuffed his advances, he became “supercritical” of her work performance, and she “neutralized” this by giving in to his demands. Based on his reactions to her submission, she concluded that she needed to maintain the sexual relationship to keep her job.

The trial court ruled for the employer and the Ninth Circuit affirmed. It first addressed this question: Has a plaintiff who contends that her supervisor coerced her into performing unwanted sexual acts by threats of discharge if she failed to comply alleged a tangible employment action under Title VII? If she can prove a tangible employment action, would it entitle her to relief against her employer without allowing it to assert an affirmative defense that it had exercised reasonable care to avoid such conduct and that the employee had acted unreasonably in failing to use the employer’s preventive procedures? The court found that absent this tangible employment action, an employer may plead the reasonable-care defense to avoid vicarious liability for supervisors’ conduct.

### Tangible employment action

The Ninth Circuit found that a tangible employment action clearly occurs when a supervisor fires or takes other punitive action against a subordinate who refuses to comply with a supervisor’s threat. But has a tangible employment action occurred when coercion is successful and the subordinate succumbs to the threat and avoids economic harm as a result? The court held that under these circumstances, participation in unwanted sexual acts becomes a condition of the employee’s employment and thus becomes a tangible employment action. So the reasonable-care defense wouldn’t be available to an employer in a case like this.

The Ninth Circuit nevertheless found that the assistant had failed to present sufficient evidence to show coercion. She didn’t have to prove that the professor had explicitly demanded sex in return for job security. Rather, she had to show that his words or conduct would

communicate to a reasonable woman in her position that participation was a condition of employment, though more than conclusory allegations to that effect would be required. The court concluded that a reasonable woman in the assistant’s position wouldn’t have cause to believe that she would be fired or suffer any other tangible employment consequences if she declined to have sex with the professor. So the Ninth Circuit ruled in favor of the employer.

### What it all means

The significance of this decision is the court’s recognition that not all sexual relationships between supervisors and subordinates open the door to Title VII employer liability. Here the assistant subjectively concluded that sex with the boss was the best way to achieve job security and possible advancement even though her boss had not implicitly or explicitly suggested it. Only when she failed to obtain promotions to other positions and only after her disability-discrimination allegations failed did she complain about sexual harassment. She never took advantage of the employer’s procedures for complaining of harassment.

*The Ninth Circuit held that not all sexual relationships between supervisors and subordinates open the door to Title VII employer liability.*

The lesson for employers is that regardless of how well-educated supervisors may be, don’t assume they have the common sense to avoid being drawn into a relationship that can lead to nothing but trouble. To avoid sexual-harassment charges, employers must train even the most highly educated and intelligent supervisors. 🏛️

# When can employers legally discriminate?

Is every type of employment discrimination unlawful? Does failure to promote part-time workers violate Title VII? Those were the questions the court dealt with in *Capruso v. Hartford Financial Services*.

## Bypassed for promotion

A financial-services company hired a woman attorney in 1992 and promoted her twice. She took two maternity leaves, but after returning from the second leave, she worked part-time at a reduced salary under the company's flextime program.

The company denied the attorney a promotion after her second maternity leave, on the ground that part-time workers weren't eligible for promotion. She resigned two years later. Her supervisor, a woman without children, then opined that the part-time schedule wasn't working and wasn't good for the company. The attorney alleged that promotion denial constituted illegal gender discrimination in violation of Title VII.

## Disparate treatment alleged

The attorney first argued that she was the victim of disparate treatment because she worked only part-time. She argued this was a function of her status as a mother, and the company was required to accommodate her because of that status. The court disagreed. It found that, unlike the Americans With Disabilities Act, nothing in Title VII required the company to reasonably accommodate her motherhood. Rather, the company did this voluntarily.

Next, the attorney argued that her part-time schedule was a "function" of her being a mother. Disagreeing, the court found that her part-time status resulted from her choice to spend more time with her children and less time at work. The court noted that other mothers employed by the company chose to work full-time. When the attorney learned that she wouldn't be promoted because she worked part-time, she could have gone back to working full-time. The court held that Title VII didn't bar discrimination based solely on one's choice to work part-time.

## Disparate impact argued

In the alternative, the attorney argued that the company's administration of its flextime option had a disparate impact on women and women with children. Under the disparate-impact theory, a plaintiff must show that a facially neutral employment practice falls more harshly on a protected group, and a company can't use "business necessity" to justify it. To establish a prima facie disparate-impact case, a plaintiff must present statistical evidence to show that the practice of making part-time employees ineligible for promotion excluded promotion applicants on the basis of their sex or status as mothers.

*The attorney argued that the company's administration of its flextime option had a disparate impact on women and women with children.*

So the attorney at trial presented evidence showing that of the 10 workers who participated in the company's flextime program nationwide, all were women, six were mothers and none were promoted while working part-time. Unpersuaded, the court found that the evidence failed to show a statistically significant impact on the attorney's protected class, because she failed to compare the overall promotion rate of females or female parents to the promotion rate of males or male parents. In other words, she failed to compare the entire protected class with the entire unprotected class. So the court dismissed her gender-discrimination claims.



## Employers urged to be wary

This case is interesting from several perspectives:

- ☛ *It shows that employment-discrimination law has grown so complex that even attorneys can be confused about their rights.*
- ☛ *It is another example of “no good deed goes unpunished.” The employer here voluntarily allowed flextime to help employees balance work and personal life, yet the program itself triggered a lawsuit against the company.*
- ☛ *It demonstrates that not every type of discrimination is unlawful.*

Clearly, this company discriminated against part-timers by denying them eligibility for promotion. But no statute bars that type of discrimination. Still, employers must be wary, because even facially neutral employment policies can lead to exposure if they have a disparate impact on a protected class of employees. 🏢

# Employers disassemble at their peril

**W**hat happens when an employer states a false reason for discharging an employee protected by the Age Discrimination in Employment Act (ADEA)? Read on to find out how the Fifth Circuit decided that question in *Palasota v. Haggard Clothing Co.*

## Hiring “race horses”

A clothing manufacturer's sales representatives consisted of men between the ages of 45 and 55. In 1995, the company president stated that he wanted “race horses” — not

“plow horses” — and deplored the significant “graying of the sales force.” Another member of management stated at a sales meeting, “Hey, fellows, let's face it, we've got an aging, graying sales force out there. Sales are bad, and we've got to figure out a way to get through it.” So, in an effort to create a younger image, the company created a new class of sales reps who were mostly young women but whose functions didn't differ from those of the male sales reps. From 1993 to 1996, the company hired between 32 and 51 sales reps in the new class, most of whom were under the age of 40, while it let go 17



salesmen over the age of 40. From 1996 to 1998, the company let go 12 sales reps over age 40 while hiring 13 new reps, all under 40 except one.

The company president told a 51-year-old sales rep who had been with the company for 28 years that he was part of the “old school” of selling. Previously, the company had called him an “outstanding” employee with “great relationships with customers” and “second to none in his sales professionalism.” He oversaw several key accounts, including two large department-store chains. The company lost one chain in late 1995 that accounted for 85% of his commissions. Although the national sales manager created a new territory for the sales rep that would have generated 85% to 90% of his 1995 commissions, the sales manager soon left the company, and his replacement offered the sales rep a less lucrative territory. The company then told the sales rep to accept the new territory or resign with a severance package. He declined the severance offer and refused to resign.

### Thinning the ranks

At that time, the company vice-president of sales sent a memo to other members of the management team noting the sales rep’s 28 years of service, his refusal to accept the severance package, and the fact that 14 other sales reps with the same tenure were over 50. For them, he recommended developing a severance package to “thin the ranks.” Of these 14 sales reps, all but two later left the company. The company then discharged the sales rep and notified him in writing that it was eliminating his job because of a “reconfiguration of the sales force.”

The sales rep alleged age discrimination in violation of the ADEA. A jury found that age discrimination motivated his discharge and awarded him \$842,000 in back pay. But the district court granted the company’s motion for judgment as a matter of law notwithstanding the jury verdict. The court held that a reasonable jury couldn’t conclude that age was a determinative factor in the discharge decision.


### Finding age discrimination

The Fifth Circuit reversed, finding sufficient evidence for a jury to find that the sales rep had been a victim of age discrimination. The court noted that the company contended at trial that the sales rep had resigned by refusing both the severance package and the new territory. And the company tried to explain that its discharge letter stating it was eliminating his job was merely an effort to provide him with extended medical benefits and severance pay.

The 5th Circuit found that a reasonable jury could infer from the letter’s falsity that the company was dissembling to hide a discriminatory purpose. The court cited the offering of severance to the 14 other sales reps and management’s age-related remarks as evidence that could lead a reasonable jury to conclude that the company discharged the sales rep as part of its plan to replace older sales reps with younger ones.

### Being consistent

Employers can learn two lessons from this case. The first is the difficulty of reversing a negative outcome after a case goes to a jury. The test is whether sufficient evidence supports the verdict — not whether the court agrees or disagrees with the verdict.

The second lesson is that employers must be consistent and honest in stating discharge reasons. By citing a false reason in the discharge letter, the company here opened the door for a jury’s conclusion that the company wasn’t to be trusted to tell the truth. 

# The same-actor defense in discrimination lawsuits

**T**he employer in this case involving gender discrimination was saved by the same-actor defense. Let's take a look at what that is and how the court decided *Crichlow v. N.Y.S. Office of Mental Health*.

## Evidence was inadequate

The case arose when a dietician at a psychiatric center interviewed a food-service applicant, but hired him instead for the higher position of diet technician when she learned he had a two-year degree in nutrition. He began work and several incidents occurred: Someone broke his stapler and the arm to his chair and caused other petty damage to his office, and several disputes arose with female co-workers. After two months, the center discharged him for lack of computer skills and his difficulty working with and supervising others.



The technician sued, alleging gender discrimination in violation of Title VII. The court found that he had presented a prima facie case, and that the center had presented a legitimate, gender-neutral reason for his discharge. The burden then shifted to the technician to establish that gender discrimination motivated his discharge. The court noted that none of his evidence explained or confronted the fact that the person who fired him had hired him just two months earlier, knowing full well that he was male. He argued that she may have hired him for the more responsible position to make it easier to fire him. But the court noted the nonsense of hiring someone with the intention of firing them. The court held that he had failed to present evidence from which a jury could find that gender discrimination caused his discharge and dismissed his suit.

The court relied in part on the same-actor defense. Under this theory, an employer discharging an employee in the protected class who was already in the protected class when hired creates a strong inference that discrimination was not a motivating factor in the discharge.

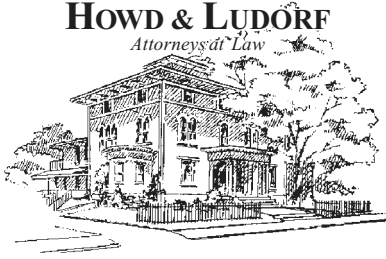
## Time is of the essence

The key to the same-actor defense is to act quickly. When a new hire isn't working out, better to document problems and cut your losses rather than prolong someone's unsatisfactory work experience. Note that the employer here documented all the incidents that showed the employee's inability to work with others and relied on this documentation in its motion for summary judgment. As a general rule, the longer someone works for you, the more incidents (and severity of incidents) you'll need to successfully defend a discrimination lawsuit. 🏠

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We hope you enjoy this edition of the Employment Law Briefing. Our goal is to provide you with articles and information that will assist you in managing the employer/employee relationship, whether you are in the public or private sector. Should you have any questions regarding the topics in this newsletter, or any related employment matter, I would ask that you contact us.

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Very truly yours,

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